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“MANAGEMENT” OF COMMUNITY ASSETS UNDER ACT 627

*George L. Bilbe**

The following discussion primarily concerns the “management” features of Act 627¹ and its related provisions defining the rights of spouses and creditors upon dissolution. The provisions of the Act permitting interspousal agreements, including matrimonial regime contracts, to be entered during marriage are also addressed. Because I am a member of the advisory committee of the joint legislative subcommittee which formulated the projet of Act 627, the discussion also includes my opinion as to the factors underlying certain of the now enacted subcommittee recommendations.²

The management provisions of the projet were significantly influenced by Senate Concurrent Resolution 54 of the 1977 Regular Session of the Louisiana Legislature. That resolution authorized the creation of the previously mentioned committees and directed the subcommittee to draft a bill incorporating “the concept of ‘equal management’ of community property by each spouse.”³ Other provisions of the resolution indicated that “equal management” was intended to describe a system in which either spouse, without the necessity of the other’s concurrence, is empowered to enter juridical acts affecting community assets. The resolution even specified that “the proposed bill . . . include a provision . . . that each spouse . . . have the right to manage, control and dispose of community property, except where specifically provided otherwise.”⁴ Other than providing that the equal management systems of designated community property states be consulted in

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1. 1978 La. Acts, No. 627.

2. All such opinions are based entirely upon the writer’s recollections of the advisory committee’s meetings with the subcommittee. Few, if any, subcommittee decisions were unanimous, and the members concurring on particular issues often did so for distinct reasons.

3. La. S. Con. Res. 54, 3d Reg. Sess. (1977).

4. *Id.*

order "to incorporate . . . the basic concept of equal management common to these states,"⁵ the resolution gave no guidance in identifying instances appropriate for departure from the general scheme of equal management. One message, however, was inescapable. The subcommittee's bill was to be a distinct alternative to the "two fund" system of the Louisiana State Law Institute, which provided, as a general proposition, that "[e]ach spouse, without the consent or concurrence of the other," could "administer, encumber, or alienate" community assets produced by his or her effort, skill, or industry.⁶ Thus, whatever the personal predilections of members of the subcommittee and of the advisory committee, compliance with the resolution required, at the least, that there be provision for equal management in a significant range of transactions and that features characteristic of the Law Institute's two fund system be restricted.

With these points in mind, the subcommittee ultimately tempered equal management by requiring concurrence of the spouses as a requisite to certain transactions and by permitting certain assets to be "managed" by one spouse alone. Nonetheless, the subcommittee, as directed by the resolution, did provide, subject to exceptions of the nature just described, that "each spouse, acting alone may manage, control and dispose of community property," and that formulation has been utilized in section 2842 of the enactment.⁷ The significance of this general principle depends, of course, on the breadth of the exceptions which will subsequently be discussed.

SATISFACTION OF OBLIGATIONS INCURRED BY THE SPOUSES: SECTION 2841

Section 2841, one of the most significant provisions affecting management, is not found under the "management" heading. Included among the "general" provisions of the com-

5. *Id.*

6. La. H.B. 783, § 2841, 3d Reg. Sess. (1977). The Law Institute's proposal never reached the House floor.

7. LA. R.S. 9:2842 (Supp. 1978) provides: "Each spouse acting alone may manage, control and dispose of his or her separate property and, except as otherwise provided by law, each spouse, acting alone may manage, control and dispose of community property."

munity regime, section 2841 provides: "Obligations incurred by a spouse before or during the community regime may be satisfied from the community and from the separate property of the spouse who incurred the obligation."⁸ In assessing the merits of this provision, certain features of the existing regime should be considered. Present law affords the husband's creditors, including his antenuptial creditors, the right to execute against community assets for satisfaction of any obligation he has incurred.⁹ Thus, it is apparent that the wife already bears the risk she will face under the new legislation, that is, her wages may be garnished and the community assets accumulated through her labors may be seized by creditors of her husband. Accordingly, the experience of wives under existing law is a logical subject for examination in assessing the decision to expose husbands to these risks. The appellate jurisprudence is no basis for determining the frequency of misfortunes under the existing regime, but it does confirm that unfortunate situations do sometimes occur. For instance, the recent case of *Corpus Christi Parish Credit Union v. Martin*¹⁰ involved an unemployed husband who, against the wishes of his wife, incurred a sizeable and arguably unnecessary debt which ultimately resulted in execution against the family home. Because the wife apparently made the predominant financial contribution toward the payment of the home's purchase price, the case poignantly illustrates the adverse consequences which can result under existing law from a husband's financial indiscretion.

Similarly, under the 1978 enactment, improvident credit transactions of either the husband or the wife can cause the loss of accumulated community assets and result in the garnishment of the salaries of both. However, the probabilities of such an occurrence resulting from a single transaction have been somewhat reduced. Under section 2843,¹¹ the encumbrance of certain community assets, including all community immovables, requires the concurrence of the spouses. Thus, in instances where a spouse desires a loan which lenders are unwilling

8. LA. R.S. 9:2841 (Supp. 1978).

9. See LA. CIV. CODE art. 2404 and *Creech v. Capitol Mack, Inc.*, 287 So. 2d 497 (La. 1973).

10. 358 So. 2d 295 (La. 1978).

11. LA. R.S. 9:2843 (Supp. 1978).

to make without security and the only available assets are regulated by section 2843, the transaction simply will not occur unless the spouses are in accord.¹² Despite this protection, there will be instances where improvident credit transactions of one spouse result in execution against community assets and therefore render the other spouse unable to pay the necessary expenses of living. The subcommittee, with full awareness of this risk, nonetheless recommended the provision ultimately enacted as section 2841.

Debts Incurred During the Community Regime

As far as debts incurred during a community regime are concerned, the subcommittee's decision was reasonably based. When a spouse has incurred a personal responsibility, his or her assets, including in some way his or her interest in community assets, should be available to the party who extended credit. Further, the most feasible means whereby a creditor can assert a claim based upon a spouse's community interest is execution against the entire community interest in particular community assets. However, it would be possible to limit the community assets available to creditors when the credit they have extended does not inure to the benefit of the "community" or the "common interest." For example, the salary of the non-transacting spouse might be protected against garnishment in the case of these obligations. The subcommittee considered but rejected this idea. Its decision was influenced by a belief that creditors should not be required to concern themselves with "common interest" determinations when deciding whether to extend credit to a married person. Additionally, it was thought that only a very small percentage of obligations incurred during marriage would not be regarded as common interest obligations. Finally, section 2852,¹³ which provides for reimbursement

12. For instance, the loan involved in *Corpus Christi Parish Credit Union v. Martin*, 358 So. 2d 295 (La. 1978), would probably not have been made without the availability of a mortgage to secure it. Section 2843 is discussed in the text accompanying notes 20-37, *infra*.

13. LA. R.S. 9:2852(E) (Supp. 1978) provides: "If community property has been used to satisfy a separate obligation of one of the spouses, that spouse shall reimburse the other spouse, or his or her heirs, upon dissolution of the community, for one-half of the community property so used."

at dissolution for community funds which have been applied to separate obligations, was recognized as affording some protection to the non-transacting spouse.

The risk of injury to one spouse by the act of the other is the nearly unavoidable consequence of equal management in a single fund community system. Act 627, however, limits the extent of possible injury for it does not personally obligate the spouse who was not a party to the transaction. Hence, in the absence of a legal theory providing a basis for such responsibility, the creditor, to the extent that he relies on the earning capacity of the spouse not his debtor, takes the risk that the community may not continue. Also, most creditors are quite concerned with the prospects of voluntary payment and for that reason alone will be disinclined to extend significant credit to a spouse when that spouse's earning capacity or control over accumulated assets does not justify the transaction. Similarly, most spouses who lack control over resources necessary to discharge a contemplated debt will be reluctant to incur it if they have reason to believe that their mates will disapprove of the transaction. Finally, with few exceptions,¹⁴ a spouse acting alone will not be able to create security interests in pre-existing community assets unless the spouse is entitled to the "sole" management¹⁵ of the asset concerned. Accordingly, the extent of the credit available to spouses who do not already have control of existing resources will be significantly limited by the inability to furnish security.

Antenuptial Debts

The reasons for affording antenuptial creditors all of the rights provided by section 2841, however, are not nearly as convincing. Under the existing regime, the husband's antenuptial creditors are already afforded the rights accorded them by section 2841.¹⁶ These traditional rights exist to protect antenuptial creditors and to preserve unsecured credit to single

14. Either spouse can encumber movable assets not regulated by LA. R.S. 9:2843, 9:2844, or 9:2845 (Supp. 1978). These sections are discussed in other portions of this article.

15. LA. R.S. 9:2844 and 9:2845 (Supp. 1978), the provisions governing sole or exclusive management, are discussed in the text accompanying notes 40-47, *infra*.

16. See note 9, *supra*, and accompanying text.

men. Such concerns, however, do not necessitate the availability of all community assets. For instance, all community assets except the earnings of the spouse who did not incur the obligation could be subjected to seizure. Alternatively, the antenuptial creditors of each spouse could be limited to the rights afforded the wife's antenuptial creditors under the Louisiana Equal Credit Opportunity Law of 1975.¹⁷

By permitting execution against assets earned by the person a debtor subsequently marries, section 2841 provides an arguable windfall. Of course, it can be contended that the financial demands resulting from marriage compete for the resources which previously have been available to antenuptial creditors and thus that it is appropriate to subject community assets to seizure. Competition from subsequent creditors, however, is a risk regularly faced by unsecured creditors, and, in any event, marriage to a debtor is an insufficient basis for subjecting a spouse to the financial and psychological burdens of garnishment. Accordingly, justification for garnishment must be found in the community regime itself. In this regard, prohibition only of garnishment, including in probability garnishment of bank accounts in which only earnings are deposited, would in no way interfere with the orderliness of the regime as enacted. Further, the new legislation may well provide a convenient means of terminating the garnishments under discussion. Under section 2834,¹⁸ a matrimonial regime contract modifying an existing regime can be entered during the existence of a marriage. Accordingly, spouses could enter a contract whereby the income of the spouse not obligated is declared to be that spouse's separate property. Because the spouses could have insulated the earnings of the spouse who did not owe the obligation by entering such a contract before marriage, and because the creditor in question extended credit before the existence of any legal relationship between the debtor and the party he or she subsequently married, the creditor's contention that the subsequent agreement is subject to

17. LA. R.S. 9:3584 (Supp. 1975) provides: "A woman's earnings during marriage are responsible for the satisfaction of debts incurred by her either before or during marriage, provided that nothing contained herein shall be construed so as to prevent a woman's separate property from being responsible for satisfying her separate debts."

18. For the text of this provision, see note 72, *infra*.

revocation as a contract in fraud of his rights should be rejected. If the creditor's contention is rejected there is little reason to permit garnishment of the salary of one spouse to satisfy antenuptial obligations of the other; the ability to terminate these garnishments would provide an additional reason for prohibiting them.

There is also the possibility of limiting the antenuptial creditor's rights against community assets to garnishment of the income of his debtor. Because the income of the antenuptial debtor may have been the source of funds through which community assets were accumulated, this alternative might be regarded as providing unwarranted protection for the antenuptial debtor. However, an additional factor may cause some to believe it appropriate. Under the terms of section 9 of Act 627,¹⁹ section 2841 will apply to obligations presently in existence. Thus, the existing antenuptial indebtedness of wives will be a basis for execution against accumulated community assets and will permit garnishment of husbands' earnings. Accordingly, the disruptive effects of execution against assets formerly exempt from seizure and of garnishment of previously insulated incomes could be accepted as basis for restricting the antenuptial creditor's rights against community assets to garnishment of the income of his debtor.

CONCURRENCE REQUIREMENTS

Section 2843 provides in part:

The alienation, encumbrance or lease of the following property, except encumbrances created by operation of law, requires the concurrence of the spouses:

- (1) Community immovables;
- (2) Community furniture or furnishings in use in the family home;
- (3) A community business or all or substantially all of the assets of the business;
- (4) Movable, when issued to or when registered as provided by law in the names of the spouses jointly.²⁰

19. 1978 La. Acts, No. 627, § 9.

20. LA. R.S. 9:2843 (Supp. 1978) continues:

This section, with certain exceptions, also establishes concurrence as a requisite to donations of community assets.²¹ It additionally provides that one spouse "may expressly confer upon the other . . . the sole and irrevocable right to alienate, encumber, or lease a community immovable or a community business or all or substantially all of the assets of a community business."²²

Although the enactment does recognize instances of exclusive management,²³ the subcommittee members, in contemplating the requisites to be established for various transactions, generally regarded concurrence as the only alternative to equal management. The decision to impose the concurrence requirements of section 2843 in lieu of equal management in the case of community immovables and community businesses was primarily based on the probability that these assets are economically significant to couples having them. Some subcommittee members believed that both spouses should participate in such decisions simply because of their impact on significant community accumulations. Further, a recognition that some community immovables have been acquired and that some community businesses have been developed through the "direct" contributions of only one spouse caused some members to believe it inappropriate to empower the other, acting alone, to make important decisions affecting these assets. The inclusion of transactions involving household furnishings in use in the family home, though perhaps influenced somewhat by the possibility of sentimental attachments, resulted mainly from a recognition that these essentials are not readily replaceable by many members of society. In particular, it was thought that these items should not be available as security for loans unless the spouses agree that they should be so utilized. The fourth provision, requiring concurrence for "issued" or "registered"

The concurrence of the spouses is also necessary for the donation of community assets, except in cases of usual or customary gifts of a value commensurate with the economic status of the spouses at the time of the donation.

A spouse may expressly confer upon the other spouse the sole and irrevocable right to alienate, encumber, or lease a community immovable or a community business or all or substantially all of the assets of a community business.

21. *Id.*

22. *Id.*

23. See the discussion of sections 2844 and 2845 in the text at notes 40-47, *infra*.

movables, simply evidenced a decision not to alter the application of a number of specialized statutes.

Because section 2843 requires husbands to obtain their wives' consent for some transactions which have not previously required concurrence, it is the subject of much debate. There are certainly positive things to be said for the concurrence requirements. They might include: the possibility that collective judgment will result in courses of action more advantageous than those which might have been taken by one spouse acting alone; the recognition of the direct financial contributions of an ever increasing number of wives who earn incomes; the recognition of a contribution of wives who do not earn incomes but who, to the detriment of the development of marketable skills, devote years to homemaking and child rearing; the establishment of protection against the spouse who, upon the disruption of the marriage, might enter transactions with a design to defeat the other's interest.

On the other hand, concurrence requirements can have their drawbacks: a spouse who is not knowledgeable may delay or even refuse to enter an advantageous transaction; opportunities for transactions requiring immediate action may be lost; such delays and stalemates may result in marital discord and possibly demands for dissolution of marriage or separation of property; wives, as a practical matter, will incur personal responsibilities as parties to transactions they would not join under the existing regime.

In most instances, parties who previously have made the decisions which will hereafter require concurrence will encounter little difficulty in securing spousal consent. Further, when one spouse is willing to do so, he or she can execute a mandate or a document contemplated by the last paragraph of section 2843, and the other spouse will then be able to enter transactions which cannot await the other's consent.²⁴ In cases where both spouses do actually participate in decision making concerning the transactions in question, it is doubtful that the friction resulting from a refusal to consent to a transaction

24. Although the last paragraph of section 2843, the product of a House floor amendment, authorizes the creation of "irrevocable right[s]" for only a limited number of transactions, it cannot reasonably be construed to prohibit the utilization of mandates to authorize transactions not mentioned in its enumeration.

proposed by one is any greater than the friction which could occur under a system permitting one to enter the transaction despite the opposition of the other. However, one likely consequence of the concurrence requirement is particularly unfortunate. As clearly illustrated in another contribution to this symposium,²⁵ the requirement of concurrence for alienation, encumbrance or lease of community immovables will result in frequent demands that wives express their concurrence by personally committing themselves as parties to these transactions. Because many creditors are only too happy to obtain the commitment of an additional party, it is particularly important to emphasize that a spouse can satisfy section 2843's concurrence requirement without incurring personal responsibility.

In the first place, section 2843 literally requires only "the concurrence of the spouses." Also, the last paragraph of the section provides that "[a] spouse may expressly confer upon the other spouse the sole and irrevocable right" to enter the transactions in question. When it is recalled that the preceding section has set forth the general rule that "each spouse, acting alone may manage, control and dispose of community property,"²⁶ it is clear, simply on the basis of statutory construction, that "concurrence" and the creation of "sole and irrevocable" rights can be accomplished through expressions not entailing personal responsibilities. Furthermore, the comment to section 2843 indicates that this provision was not intended to compel both spouses to incur personal obligations as parties.²⁷ Accordingly, the entitlement of a contracting party to the personal responsibility of both spouses depends upon the agreement he has entered. For example, a married man who signs a contract to sell immovable property incurs a personal responsibility to the buyer. However, if his wife is not a party to this agreement, she incurs no personal responsibility whatever. Thus, if she is willing to sign a formal document consenting to her husband's

25. See Tête, *A Critique of the Equal Management Act of 1978*, 39 LA. L. REV. 491, 502-16 (1978).

26. For the text of section 2842, see note 7, *supra*.

27. The first paragraph of the comment provides: "A spouse who joins in a transaction or grants a power of attorney or mandate becomes a party to the transaction unless personal responsibility as a party is expressly negated." LA. R.S. 9:2843, comment (Supp. 1978) (emphasis added).

conveyance of the property, he, if his title is otherwise merchantable, is in a position to fulfill his contractual commitment, and the purchaser who has not bargained for the wife's participation as a vendor should have no basis for complaint. If, on the other hand, a purchaser in a contract to sell obtains the signatures of both spouses as parties to the transaction, he is entitled to demand that both execute the act of sale as vendors because of the contractual commitments he has obtained.

Because a specifically enforceable claim to the property will not exist until some form of written concurrence has been expressed, the signatures of both spouses will be sought, and the form documents so often utilized in evidencing agreements to sell will identify all signatories as principals. However, a spouse not desiring to incur such a responsibility could readily accompany his or her signature with words of limitation and thereby avoid responsibility as a vendor. The purchaser would nonetheless obtain a specifically enforceable contract and would have the personal responsibility of the party whose commitment was not limited.

As previously indicated, the last paragraph of section 2843 provides a basis whereby one spouse can empower the other to enter transactions involving community assets without the necessity of any further expression of concurrence. Whether a spouse who executes a document conferring "the sole . . . right to alienate, encumber, or lease" incurs a responsibility as a party when such transactions are subsequently entered depends upon the terms of the document executed. If the document describes itself as a mandate and does not limit the authority of the mandatary, the execution of an authorized transaction will result in the personal responsibility of the mandator as a party to the transaction.²⁸ If, on the other hand, the document authorizes one spouse to enter defined transactions but expressly negates any authority to obligate the other as a party, the terms of the document clearly control. Thus, if a wife were to execute such a document in authentic form authorizing her husband to sell immovable property, he, without the necessity of any further participation by her, could convey the entire community interest in that property, and she would owe no

28. See LA. CODE arts. 2985 and 3021.

warranty against eviction or redhibitory defects. Similarly, a spouse might authorize the other to lease or encumber specific assets and disclaim any personal responsibility for the obligations which the authorized spouse might incur.

It has been suggested, however, that the party who obtains the personal responsibility of one spouse and the concurrence of the other may face risks not faced by the party who demands the personal responsibility of both.²⁹ In particular, there has been a suggestion that a spouse who concurs might be permitted to rescind an act of concurrence induced by his or her mate's fraud or unfulfilled promise.³⁰ Before examining this suggestion, it is significant to note that any risk resulting from a spouse's fraud or unkept promise is borne only by the party who deals directly with the spouses whose community interests are concerned. This is so because a spouse's act of concurrence authorizes the other to affect the entire community interest, and once the authorized transaction has been entered, the executed documents, on their faces, evidence an onerous transaction. Thus, once the pertinent documents have been recorded, the unblemished onerous transaction thereby described will protect any subsequent party who records the documents evidencing his transaction while the public records remain in this unblemished state.³¹ Further, if a document which "confer[s] upon the other spouse the sole . . . right to alienate, encumber, or lease a community immovable" has been recorded before the occurrence of a transaction which the document authorizes, the public records doctrine probably affords protection to anyone who transacts and records the documents evidencing the authorized transaction before the recordation of a document revoking a revocable authorization or before the filing of a notice of *lis pendens* advising of a suit to rescind an irrevocable authorization.³²

Turning to rights not depending upon the public records doctrine, several observations may be made. If both husband

29. See Tête, note 25, *supra* at 509-15.

30. *Id.*

31. See LA. R.S. 9:2721 and 9:2722 (1950).

32. LA. R.S. 9:2721 and 9:2722 (1950) provide protection in this situation if the party relying on the previously recorded authorization can be classified as a third party under these statutes.

and wife sign an act of sale, the rights of the purchaser in the property itself are in no way affected by the number of spouses who incur the traditional responsibilities of vendors. For example, if a wife joins her husband either by concurring only or by selling without warranty, she consents to the transfer of the entirety of her community interest. Despite any lies her husband may have told or promises he may have made to induce her participation, she, at least as long as she realizes that a sale is occurring, should be precluded from rescinding a sale to a good faith party. Whether she incurs the usual responsibilities of a vendor or not, her principal cause,³³ as objectively perceived by the vendee, is the transfer of a community asset, and the fraud of the husband alone, under Civil Code article 1847(9),³⁴ is simply no basis for upsetting the transaction.

The principles governing sales are equally applicable to leases and encumbrances. In determining whether a spouse can rescind the lease of a community immovable to a good faith lessee, the issue is the existence of error as to principal cause as principal cause can reasonably be perceived by the lessee. Hence, where a lessee is unaware of a spouse's misrepresentations, the principal cause is properly identified as the creation of the lease arrangement. This is so whether a spouse only concurs in the transaction or expresses personal commitment as a lessor. Accordingly, the lessee who enters a lease as to which the spouse of the lessor concurs faces no greater risk of rescission than would be faced if the personal responsibility of both spouses were obtained.

This is also the case with encumbrances. The Civil Code clearly permits a party to mortgage property to secure the indebtedness of another without incurring personal responsibility for the indebtedness secured.³⁵ There has been suggestion, however, that a creditor would more fully protect a mortgage from a spouse's claims for rescission by causing that spouse to incur

33. See LA. CIV. CODE arts. 1823, 1825, and 1826.

34. Article 1847(9) of the Civil Code provides in pertinent part:

If the artifice be practiced by a party to the contract, or by another with his knowledge or by his procurement, it vitiates the contract; but if the artifice be practiced by a third person, without the knowledge of the party who benefits by it, the contract is not vitiated by the fraud

35. LA. CIV. CODE arts. 3295-97.

a personal responsibility for the indebtedness secured.³⁶ Once more, the principal cause of the mortgagor will be determined by the reasonable perceptions of the mortgagee. For example, in cases where funds have not yet been lent, the principal cause will be the desired extension of credit to the borrower. Thus, the creation of personal responsibility should in no way reduce the number of complaints upon which a spouse consenting to a mortgage might seek its rescission.

In the case of a transaction entered pursuant to a previously unrecorded document "confer[ring] . . . the sole . . . right to alienate, encumber or lease a community immovable," there has also been suggestion that the judiciary might permit rescission if the spouse conferring the right has been induced to do so by the fraud of his or her mate.³⁷ The probability of such a judicial response, however, is remote. In any event, this risk would not be reduced by obtaining a mandate authorizing the mandatory spouse to obligate the other personally. A spouse who has signed such a document can nonetheless assert that his or her consent was fraudulently induced. Hence, the rationale for disregarding the risk that the mandator's consent might be vitiated, whether it be the "sanctity" of authentic form, the "apparent authority" of the mandatory, or other factors, is equally applicable. Furthermore, the obvious purpose of the last paragraph of section 2843 is to provide a means through which transactions can safely be entered with one spouse without the necessity of involving the other.

*Judicial Authorization to Act Without a Spouse's Consent:
Section 2847*

An assessment of the concurrence requirements of section 2843 requires an examination of section 2847. It states:

Either spouse, on petition by summary proceedings, may be authorized by the court to act without the consent of the other upon showing that such action is in the best interest of the family and that the consent of the other spouse has been arbitrarily refused or cannot be obtained

36. See Tête, note 25, *supra* at 513.

37. See Tête, note 25, *supra* at 509-15.

due to the physical incapacity, mental incompetence, commitment, imprisonment or absence of the other spouse.³⁸

Such a provision, of course, is necessary in a system utilizing concurrence requirements and provides as much guidance as such a statute can be expected to afford. In particular, it is reasonable, if not elegant, to require not only a showing that a transaction is in the best interest of the family but also an illustration that the unwilling spouse has arbitrarily refused to enter the transaction. In this way, the judiciary is directed that it is not to substitute its judgment for that of the spouse opposing the transaction simply because it finds the petitioning spouse's position to be more reasonably based. In cases where a spouse who is not interdicted is absent or unable to represent himself, the best interest of the family standard should provide ample flexibility for dealing with the variety of situations which might be presented.

It is doubtful that many spouses intending to remain married will initiate section 2847 procedures when confronted with spousal opposition. However, the procedure may be utilized with some frequency in situations where marriages have significantly deteriorated. Further, because section 2834 permits voluntary property settlements to be entered at any time, there is the chance that a spouse might withhold consent to a transaction of pressing importance in an endeavor to obtain a more favorable property settlement. Accordingly, it may be advisable to amend section 2847 to affirm its availability during the pendency of a suit which could result in the dissolution of the community. There is a possibility that the section will be construed to permit the initiation of an action at this time. Because community regimes will continue to be dissolved retroactively,³⁹ however, such an amendment is in order if the availability of the procedure is to be assured.

38. LA. R.S. 9:2847 (Supp. 1978).

39. Civil Code articles 155 and 159 are not repealed by Act 627. Also, section 2856 of Act 627 provides for retroactive dissolution in case of suits for separation of property.

SOLE MANAGEMENT

Community Businesses and Partnership Interests: Section 2844

Section 2844 provides for sole or exclusive control of certain community assets.⁴⁰ The provisions formulated by the subcommittee concerned only movable assets of a community business. A House floor amendment added the section's last sentence concerning partnership interests to the subcommittee's proposal. These provisions will be separately discussed. The first rather lengthy sentence provides:

A spouse who manages a community business without the participation in management of the other has the sole right to acquire, encumber, alienate or lease the movable assets of the business but cannot exercise this right alone if the encumbrance, alienation or lease comprises all or substantially all of the movable assets of the business or affects movables issued or registered in the name of the spouses jointly or the name of the other spouse alone, as provided in R.S. 9:2843 and R.S. 9:2845.⁴¹

When it is remembered that section 2842 empowers each spouse, acting alone, to manage, control and dispose of community property "except as otherwise provided by law," it becomes apparent that the quoted language of section 2844 is concerned only with the negation of an otherwise existent authority. The provision is designed to discourage transactions with a spouse whose involvement in a business operation is questionable. In this light, the "participation in management" language appears well chosen, for many activities, including some occurring on a regular basis, are not likely to be found to involve management. Further, in the subcommittee's view, it is normally quite easy to identify at least one spouse who unquestionably participates in management. If a party enters a transaction with such a spouse, he can be assured that his transaction will be upheld. If, on the other hand, he deals with a spouse whose involvement in the business is not so clear, he

40. LA. R.S. 9:2844 (Supp. 1978).

41. *Id.*

transacts subject to the risk that this spouse does not participate in management.

The community business exception plays a role only if the spouses have community ownership interests in the movable assets in question. Hence, the provision has no application to transactions involving movable assets of a corporate entity because the shareholders own shares in the corporation and not its assets, whether movable or immovable. For similar reasons, the exception is unnecessary to prevent the spouse of a partner from alienating partnership assets. It may be that a partner has only an ownership interest in a partnership entity and no ownership interests in partnership assets themselves.⁴² In any event, it is clear that interests in partnership assets can only be transferred or otherwise affected by a party empowered to do so,⁴³ and the partners do not impliedly authorize a partner to affect undivided interests corresponding to his interest in the partnership. Accordingly, a spouse of a partner cannot enter transactions which the partner is not empowered to enter, and when partners authorize a partner to alienate partnership assets they do not impliedly authorize his or her spouse to do likewise. Hence, there is no need to resort to the community business exception to negate authority of a partner's spouse to affect movable partnership assets.

The community business exception might be utilized, however, in situations where the existence of a partnership relationship is questionable. For example, if parties purchased an unregistered movable with the intention of a subsequent sale, the exception might be employed to rescind a spouse's sale of the community interest resulting from the purchase, without the necessity of determining whether the arrangement of the purchasers constituted a partnership. For the most part, however, the community business exception will find application in the case of sole proprietorships.

The last sentence of section 2844 provides: "A spouse who is a partner has the sole right to alienate, encumber or lease the

42. Partnerships are often said to be legal entities. *See, e.g.,* LA. CODE CIV. P. art. 688, comment. The text of the article provides that a "partnership has the procedural capacity to sue to enforce its rights in the partnership name."

43. *See* LA. CIV. CODE arts. 2867-71.

accompanying partnership interest." The amendment thus undermines any contention that a partnership interest, as an interest distinct from partnership assets, is subject to alienation, encumbrance or lease by either spouse under the general principle of equal management of section 2842.

Two further observations concerning section 2844 may be appropriate. The provision that one spouse may have the "sole right to acquire . . . movable assets of the business" could be misleading. A spouse who does not participate in the management of a community business is not for that reason contractually incapacitated. Thus, if such a spouse contracted to purchase movable property with the intention that it be used in the community business, this spouse would incur an obligation to pay the purchase price unless the purchase were made in a representative capacity and the spouse operating the business authorized or ratified the transaction.⁴⁴ In the absence of authority or ratification, however, the spouse operating the business would not incur a personal responsibility for the purchase price. For this reason there is a basis for providing that the spouse who does not participate in management cannot acquire movable assets for the business. Nonetheless, the subcommittee has voted to recommend the deletion of acquisitions from the enumeration of sole rights in section 2844 to avoid any contention that the section affects the personal responsibility of a spouse for his or her own acts.

Finally, the section, like the other provisions for exclusive management and the provisions imposing concurrence requirements, does not prevent involuntary alienations.⁴⁵ Hence, the movable assets of a community business and partnership interests, like all other community assets, are subject to execution for satisfaction of judgments against either spouse.

Movables "Issued or Registered as Provided by Law": Section 2845

Section 2845 provides a significant exception to equal management. It states: "A spouse in whose name movables are

44. LA. CIV. CODE art. 3010.

45. Section 2841 subjects all community assets to execution for satisfaction of debts of either spouse.

issued or registered as provided by law has the sole right to manage them,⁴⁶ encumber, lease or alienate them.”⁴⁶ As well as can be determined, the expression “issued or registered as provided by law” has not heretofore had a crystallized definition. The comment to the section, however, identifies “accounts” governed by “[b]anking law,” “instruments” subject to “Commercial Laws” and stock which has been “issued” as examples of movable assets regulated by the section. In this light it seems that the section was meant to encompass all movable assets for which there is specialized legislation concerning transfer or control. It thus appears that sole rights will exist as to assets such as motor vehicles, negotiable documents of title, and securities. On this basis, it is quite obvious that the control of many of the most important forms of wealth will be subject to the exclusive management of one spouse. As previously noted, however, issuance or registry in the name of one spouse will not insulate an asset from involuntary alienation for satisfaction of debts incurred by the other.⁴⁷

DECLARATIONS IN ACQUISITIONS AND THIRD PARTY RIGHTS:
SECTION 2839(2)

Another significant management feature is found in section 2839, a provision not contained under the “management” heading. The second subsection of this provision, after providing that things acquired with separate assets are the separate property of the acquiring spouse, continues: “The declaration in the act of acquisition that the things are acquired with the separate assets of the acquiring spouse may be controverted by the other spouse or by their creditors, but without prejudice to the rights of third persons”⁴⁸ This provision was designed to insulate parties transacting with a spouse in reliance on an instrument containing such a declaration from the risk of the declaration’s falsity. Under existing law, the husband is empowered to alienate by onerous transaction any community immovable acquired in his name alone except, in some circum-

46. LA. R.S. 9:2845 (Supp. 1978).

47. See note 45, *supra*.

48. LA. R.S. 9:2839 (Supp. 1978).

stances, the "family home."⁴⁹ Thus, in the case of immovables acquired in his name, the validity of his alienations, mortgages or leases does not presently depend on the classification of the property as community or separate. Under section 2843 of the new enactment, however, alienation, encumbrance or lease of community immovables requires the concurrence of the spouses. Hence, in the absence of the provision now under discussion, the party who transacts with only one spouse would in all instances bear the risk that the immovable might not be a separate asset. Under subsection 2839, however, a party does not bear this risk if the spouse's *act of acquisition* contains a declaration that the property is acquired with his or her separate assets. In instances where the instrument of acquisition does contain such a declaration, the existing law, as it concerns transactions by husbands during the existence of the community, will not significantly be changed. It will be changed as to such transactions entered by wives, however, for parties who have dealt only with wives heretofore have borne the risk that the property might be community.⁵⁰ In the case of transactions occurring subsequent to the community's dissolution, there will be a change as to both husbands and wives, for subsection two is not limited to transactions occurring during the existence of the regime. Thus, even if the appropriate public records reflect a dissolution resulting from a judgment or a dissolution has resulted from a wife's death,⁵¹ a party who transacts with a husband will be protected by subsection two from complaints by his wife or her heirs not revealed by the public records. In the case of post-dissolution transactions by wives, there of course will be change also for these acts have previously entailed the same risk they present in transactions occurring during the existence of the regime.

DISSOLUTION

An Overview

The rights of creditors at dissolution will depend upon the

49. See LA. CIV. CODE arts. 2334 and 2404; LA. R.S. 9:2801-04 (Supp. 1978).

50. See, e.g., Succession of James, 147 La. 944, 86 So. 403 (1920).

51. Under existing jurisprudence, good faith parties bear the risk of dissolution resulting from death. See *Long v. Chailan*, 187 La. 507, 175 So. 42 (1937).

course of action taken by the spouses. The following outline addresses only the rights of creditors whose transactions have occurred prior to the date of dissolution of the regime. Because judgments of separation from bed and board, divorce, and separation of property will continue to dissolve communities retroactively, this discussion does not address the rights of creditors whose transactions occur before judgment but after the filing of the petition which ultimately identifies the date of dissolution.

The provisions addressing dissolution provide that dissolution itself, no matter what the basis for its occurrence, does not alter the rights of creditors to execute against community assets and the separate assets of their debtors. Section 2849 states: "Except as otherwise provided in this Subpart, upon dissolution of the community regime, the claims of creditors may be satisfied from the community property and from the separate property of the spouse who incurred the obligation."⁵² The only exception in the subpart is found in section 2851. It permits either spouse, "[u]pon dissolution . . . or pending a suit that may result in . . . dissolution," to petition for an administration of community property and provides that "the filing of this petition" prevents execution from issuing "against any community property, except for the enforcement of conventional mortgages or pledges."⁵³ Thus, under the express terms of the new legislation, dissolution, in the absence of a petition for administration, affects creditors only as it results in the reclassification of assets such as subsequent salaries and fruits and revenues of separate property which previously have been community property. However, despite the import of the word formula of section 2849, it is extremely doubtful that anyone intended to overrule the Code of Civil Procedure provisions limiting execution against property of a decedent.⁵⁴ This matter, including rights of creditors of the surviving spouse, needs clarification.

Because of the rights afforded creditors under section 2849, the provision of section 2850 may appear curious. It provides

52. LA. R.S. 9:2849 (Supp. 1978).

53. LA. R.S. 9:2851 (Supp. 1978).

54. LA. CODE CIV. P. arts. 3241-49.

that "[a] spouse who accepts the community expressly and unconditionally upon the dissolution thereof is personally obligated for one-half the outstanding obligations incurred by the other spouse for the common interest of the spouses."⁵⁵ If an express acceptance permitted the accepting spouse to insulate his or her share of community assets from his or her spouse's community creditors by paying them one-half of what they are owed, the utility of an express acceptance would be clear. Because of the provision of 2849, however, all assets of the former community, even if partitioned by the spouses, remain subject to seizure by any creditor who has not been paid in full. Thus, a spouse who expressly accepts and pays every community creditor of the other spouse one-half of what is owed does not thereby insulate the community assets he or she receives through partition. The assets received remain subject to execution to satisfy the other spouse's separate creditors and any community creditors who have not been paid the remaining half of what they were owed. Accordingly, the provision appears to have utility only to creditors and to spouses who might condition voluntary partitions upon the occurrence of express acceptances by their spouses. Since the enactment of this legislation, the subcommittee has voted to recommend an amendment to section 2850 to provide that a spouse who has accepted "*is entitled to one-half of the assets and is personally obligated for one-half the outstanding obligations incurred by the other spouse for the common interests of the spouses.*"⁵⁶ The proposal is intended to define the rights of creditors as well as those of the spouses. Hence, the accepting spouse's interest in community assets would be subject to execution by creditors of the other spouse only if they were common interest creditors. Because acceptance would obligate the accepting spouse personally to these creditors for one-half of their claims, they could execute not only against the accepting spouse's interest in com-

55. LA. R.S. 9:2850 (Supp. 1978).

56. (Emphasis added.) The decision to recommend the amendment was made at a meeting conducted on September 6, 1978. The full text of the proposed amendment reads: "A spouse who accepts the community expressly and unconditionally upon the dissolution thereof is entitled to one-half of the assets and is personally obligated for one-half the outstanding obligations incurred by the other spouse for the common interest of the spouses."

munity assets but also against any other property he or she might have. Payment of one-half of such a creditor's claim, however, would insulate all of the accepting spouse's property, including his or her interest in community assets, from execution even if the spouse who incurred the obligation failed to pay the remainder. The proposed amendment would encourage voluntary partitions and at the same time provide reasonable protection for common interest creditors. It would, however, affect the rights of those creditors whose transactions were not incurred for the common interest. In the case of antenuptial creditors, this treatment is particularly appropriate, and in the case of a separate debt incurred during the marriage, it is justifiable.

One further observation should be made concerning section 2850. It imposes responsibility on a spouse for common interest obligations of the other only in the case of an express acceptance. The existing regime, on the other hand, additionally recognizes responsibility under a concept which might be termed tacit acceptance.⁵⁷ Accordingly, certain activities, including participation in a voluntary partition, result in the wife's responsibility to community creditors. The subcommittee, aware of this concept, concluded that a spouse should not normally incur a personal responsibility to creditors of his or her spouse in the absence of an express affirmation of willingness to do so. When it is remembered that the new legislation, as enacted, will permit creditors to execute against assets of the former community even if they have been partitioned, it is apparent that creditors have ample protection as long as the partitioned assets are retained by the spouses. However, when partitioned assets are alienated, concern for unsecured creditors is appropriate. The subcommittee, nonetheless, concluded that unsecured creditors were sufficiently protected by the personal responsibility of their debtor, their rights to execution against partitioned assets in the hands of either spouse, and the liability of their debtor's spouse which might exceptionally be recognized under the principles of the revocatory action.⁵⁸

57. See LA. CIV. CODE arts. 2411 and 2418.

58. See LA. CIV. CODE arts. 1968-94.

Administration of Community Assets Under Sections 2851 and 2852

Under the terms of Act 627, the provisions concerning administration will not have effect until "Louisiana Code of Civil Procedure articles have been enacted governing the procedure for an administration of community property."⁵⁹ Hence, the administration contemplated by Act 627 will not be available unless additional legislation is passed. Before offering several observations concerning the already enacted administration provisions and discussing factors to be considered in drafting future legislation, several comments may be appropriate. First, nothing in this enactment, including the dissolution provisions, discharges either spouse of any personal responsibility he or she has incurred. Even though the enactment identifies certain obligations as common interest obligations, every such obligation is the personal responsibility of at least one of the spouses. Thus, the administration procedures will affect the responsibilities of the spouses only as they cause funds to be applied to obligations. Further, they do not prevent or suspend litigation through which a creditor endeavors to reduce a claim to judgment, and they do not affect the right of a spouse's creditor to execute against that spouse's separate property. Accordingly, protection of the interest of creditors seems only to require a reasonably expeditious and cost conscious process. In this regard, a procedure should be provided so that creditors can assert complaints concerning the progress of the proceeding. Also, in the case where an administration has been requested during a suit which may result in the dissolution of the community, there should be a provision identifying circumstances entitling creditors to demand that an administration proceed during the pendency of the litigation.

Turning again to an examination of the provisions which have already been enacted, the payment scheme of section 2852 is of particular interest. Section B logically provides that "[s]ecured creditors shall be paid with priority from the proceeds of secured property" and that "any balance due shall be paid to them as unsecured creditors."⁶⁰ Section C then provides

59. 1978 La. Acts, No. 627, § 9.

60. LA. R.S. 9:2852(B) (Supp. 1978).

that "[e]ach unsecured creditor shall be paid in the proportion that his claim bears to the total obligations of both spouses."⁶¹ Hence, all pre-dissolution creditors of each spouse, including antenuptial creditors, are to be paid ratably without regard to the identity of the spouse with whom they have dealt. For example, if during the existence of a community regime a husband and wife incurred unpaid debts of \$3,500 and \$1,500, respectively, and \$4,000 in community funds were available for distribution, each creditor of each spouse would receive eighty cents on the dollar. If all debts incurred by each were common interest debts, neither spouse should have complaint. If, on the other hand, separate debts incurred during the regime or debts incurred prior to marriage were involved, the spouse who did not incur them might well resent the distribution prescribed by the statute.

In the case of obligations incurred during the community regime, the decision to distribute funds without regard to common interest factors was clearly well based. In the first place, only a small fraction of claims would ever be identified as separate, and in some of those instances the creditor would not have been able to detect that the transaction lacked the common interest element. Thus, there was sound reason to avoid the delay which would result from the involvement of common interest determinations. This administrative concern is not present, however, when antenuptial claims are at issue. There of course would be an occasional dispute concerning the date of a transaction, but this should not prevent the formulation of a scheme distinguishing the antenuptial creditor. However, the subcommittee, because it believed that antenuptial creditors should somehow participate in the distribution of community funds, and because it had decided to permit such creditors to execute against community assets during the existence of the community, decided to recommend that the antenuptial creditor participate ratably. Because he has been a creditor longer than any of his postnuptial counterparts, the antenuptial creditor should participate in an administration. Further, it is certainly difficult to formulate a workable alternative. However, one possibility should be considered. It would be rea-

61. LA. R.S. 9:2852(C) (Supp. 1978).

sonable to pay the creditors of the spouse who owed no antenuptial debt the sum they would have received if no antenuptial debt had existed, and then to divide the remaining funds ratably among all creditors of the spouse who incurred the antenuptial debt. Altering the previous example so that the husband's \$3,500 indebtedness includes a \$1,000 antenuptial component, but otherwise leaving the facts unchanged, would result in a situation in which the wife's creditors are paid in full and \$2,500 is divided ratably among all creditors of the husband so that each receives five-sevenths of what is due. This is so because the total indebtedness incurred during marriage, her \$1,500 and his \$2,500, could have been extinguished with the \$4,000 available for distribution.

Such an approach is justifiable for two reasons. First, the assets being distributed are community assets which have been accumulated despite the existence of the antenuptial debt. Because the system recognizes an equal interest of each spouse in these accumulations,⁶² it seems appropriate, to the extent feasible, to limit the claim of the separate creditor to the interest of his debtor. In the case of claims asserted during the existence of the community regime, the subcommittee, rationally and in accordance with tradition, concluded that the availability of execution against community assets was the most reasonable means whereby claims based upon a spouse's community interest might be enforced.⁶³ During an administration conducted at dissolution, however, when previous obstacles to restricting the antenuptial creditor's claim have been removed, there is no need to afford the antenuptial creditor all rights of a common interest creditor. Further, the enactment of the subcommittee's proposed amendment to section 2850 would logically necessitate a corresponding limitation of the rights of the antenuptial creditor in administration proceedings. The proposed amendment would insulate an accepting spouse's interest in community assets from execution to satisfy claims of the other spouse's antenuptial creditors. If a spouse's community interest is not to be affected by the other spouse's antenuptial

62. LA. R.S. 9:2838 (Supp. 1978) provides that each spouse "owns a present undivided one-half interest in the community property."

63. This decision resulted in the formulation of section 2841.

indebtedness in cases where the combination of community assets and common interest obligations justifies an express acceptance, there is no reason why a spouse should be adversely affected by the other's antenuptial claims where insolvency renders an express acceptance inadvisable.

While on the topic of separate creditors, another matter might be mentioned. It would be possible to permit post-dissolution claims to be asserted in an administration, as long as these claims affect only the interest of the spouse who incurred the debt. Thus, these debts could be regulated precisely as it was suggested that antenuptial obligations be treated. Community assets could be allocated on the basis of obligations incurred during the existence of the community, and then the post-dissolution creditors could be permitted to share ratably with pre-dissolution creditors in the assets allocated to their debtor. Thus if the husband's pre-dissolution indebtedness was \$10,000 and his wife's was \$5,000, and there were community assets of \$10,000, the husband, because his debts constitute two-thirds of the total indebtedness incurred during the regime, would be allocated two-thirds of \$10,000, the available assets. Accordingly, \$6,666.66 would be available to his creditors, including post-dissolution creditors. Likewise, \$3,333.33 would be available to creditors of his wife.

There is, of course, question as to whether the interests of unsecured post-dissolution creditors warrant any additional complication of administration procedure. One's resolution of this question may well be influenced by the point at which dissolution resulting from suit becomes effective as to third parties. Because of the provision of Civil Code articles 150, 155 and 159,⁶⁴ the date of the petition which identifies the dissolu-

64. LA. CIV. CODE arts. 155 and 159 and section 2856 of the new enactment all provide for retroactive dissolution. The rights of creditors who extend credit after the filing of suit but before judgment, however, are not as certain as they should be. Articles 155 and 159 provide that the retroactive effect of their provisions "shall be without prejudice . . . to rights validly acquired in the interim between commencement of the action and recordation of the judgment." Further, Civil Code article 150 states:

From the day on which the action of separation shall be brought, it shall not be lawful for the husband to contract any debt on account of the community, nor to dispose of the immovables belonging to the same, and any alienation by him made after that time, shall be null, if it be proved that such alienation was made with the fraudulent view of injuring the rights of the wife.

tion date between the parties may also be the date of dissolution as far as the rights of unsecured creditors are concerned. If this is the case, post-dissolution creditors, who may not have been aware of the pending litigation, might rationally be permitted to participate in an administration. Future provisions should identify clearly the date of dissolution as it affects claims of creditors and should consider this determination in deciding whether post-dissolution creditors should be permitted to participate in the administration.

INTERSPOUSAL AGREEMENTS

The provisions concerning interspousal agreements will result in some of the more striking changes to be produced by the enactment. Civil Code article 1790,⁶⁵ which has consistently been held to be a general prohibition against interspousal contracts,⁶⁶ will be amended to delete all references to agreements between spouses.⁶⁷ Civil Code article 2446, which permits interspousal sales in only three limited situations,⁶⁸ and Civil Code article 1751,⁶⁹ which prohibits reciprocal donations through an act executed during marriage, will be repealed.⁷⁰ Finally, article 2329,⁷¹ which prohibits matrimonial regime contracts subsequent to the marriage ceremony, will be repealed and replaced

In at least two instances, appellate courts, utilizing article 150, have concluded that an obligation incurred by a husband after the filing of suit is his separate debt even if he has no intention of injuring the rights of the wife. *See Landreneau v. Ceasar*, 153 So. 2d 145 (La. App. 3d Cir. 1963) and *Ohanna v. Ohanna*, 129 So. 2d 249 (La. App. 4th Cir. 1961). Argument could be made, of course, that the previously quoted provisions of articles 155 and 159, as more recent legislation, tacitly repealed the restrictions in article 150. Because the application of article 150 is not dependent upon retroactive dissolution, however, any such contention is not apt to be accepted. Thus, the way is open for concluding that the provision of article 150 concerning debt will not be tacitly repealed by Act 627 but will instead be applicable also to transactions of wives. There is also the possibility of concluding that the provision will be tacitly repealed and that the question must be decided under article 155, article 159 or section 2856. This matter, of course, should receive attention.

65. LA. CIV. CODE art. 1790.

66. *See, e.g., Ward v. Ward*, 339 So. 2d 839 (La. 1976).

67. 1978 La. Acts, No. 627, § 3.

68. LA. CIV. CODE art. 2446.

69. LA. CIV. CODE art. 1751.

70. 1978 La. Acts, No. 627, § 5.

71. LA. CIV. CODE art. 2329.

by section 2834,⁷² a provision permitting contracts establishing, modifying, or terminating matrimonial regimes to be entered "at any time before or during marriage."

In assessing the merits of these provisions, it is appropriate to identify instances where interspousal agreements can clearly serve useful functions. Spouses should perhaps be permitted to enter precise loan agreements and be permitted to create encumbrances to secure repayment in instances where one advances funds to the other. Similarly, in the case of purchases in which separate property constitutes a portion of the purchase price, it would be reasonable to permit spouses to define their rights at dissolution of the community and perhaps to specify ownership in indivision in lieu of community interests with rights to reimbursement. Also, spouses engaged in the same profession sometimes assert that there should be no prohibition to their becoming members of the same partnership. Further, it can reasonably be contended that spouses of shareholders, who today enter enforceable contracts to transfer their community interests to the corporation upon the dissolution of their community regime, would be no worse off if they could at that time be required to transfer their interests to their spouses. Additionally, there might be situations where the lease of property by one spouse to the other would be mutually beneficial. There are no doubt more convincing examples.

The provision permitting matrimonial regimes to be modified during marriage can also have utility. In fact, some might argue that the permissibility of antenuptial contracts under existing law is in itself basis for permitting their subsequent adjustment. Changed circumstances or poor advice, for example, can provide situations where one spouse might reasonably seek a regime alteration which the other would be willing to grant. Further, parties uncertain of the advisability of a matri-

72. LA. R.S. 9:2834 (Supp. 1978). Section 2834 provides in its entirety:

A contract, whether establishing a matrimonial regime or modifying or terminating an established regime, may be entered into at any time before or during marriage. It may be made only by an act passed before a notary public and two witnesses; it shall not be effective against third persons until filed for registry in the mortgage records of the parish where the spouses are domiciled and, in relation to immovables, until filed for registry in the mortgage records of the parish where the immovable is situated.

monial agreement at the time of their marriage may subsequently determine that an alternative to the community is mutually beneficial. Also, in the case of significant legislative revisions of the legal regime, it is appropriate to permit spouses to enter alternative arrangements. Additionally, regime modification will have utility in estate planning.

An assessment of the provisions under discussion also requires an examination of the risks they entail for spouses, creditors and forced heirs. The potential for exploitation of spouses depends to a considerable extent upon the standards which are developed for assessing complaints of unfairness. Because of the interspousal trust characterizing many marriages, it would be appropriate, at least prior to the disruption of a relationship, to recognize causes of action simply because one spouse has knowingly advanced his or her interests to the detriment of the other. In the case of efforts to defraud creditors, there is reasonable basis for believing that litigation will normally expose fraudulent efforts. In particular, existing jurisprudence involving the revocatory action and the action in declaration of simulation suggests that interspousal transactions will be scrutinized strictly when the rights of creditors are concerned.⁷³ In the case of forced heirs, however, there is greater likelihood that deception will be successful. In particular, lengthy intervals between the execution of documents and death will provide obstacles to a demonstration that purportedly onerous transactions were truly gratuitous.

CONCLUSION

Sections 2841 and 2843 are perhaps the most significant of the management provisions of Act 627. The former permits either spouse's creditors, including antenuptial creditors, to execute against community assets, and the latter establishes concurrence of the spouses as a requisite to enumerated transactions involving specified community assets, including immovables and businesses. The importance of section 2842, which declares as a general proposition that "each spouse, acting alone may manage, control and dispose of community prop-

73. See, e.g., *Agricultural Supply Co. v. Lavigne*, 179 La. 1030, 155 So. 764 (1934) and *Howard v. Howard*, 96 So. 2d 345 (La. App. 2d Cir. 1957).

erty," is substantially limited by section 2843 and by sections 2844 and 2845, which provide for sole or exclusive management of partnership interests, movable assets of community businesses, and movables issued or registered in the name of one spouse.

The provisions concerning dissolution, which as a general proposition afford creditors the rights they presently have during the community's existence, are distinguished by a section permitting either spouse to petition for an administration of community assets. Because the enacted provisions do not supply a comprehensive administration scheme, however, Act 627 defers the effective date of the administration provisions until the passage of further legislation, and for this reason, there is little beyond the administration concept to evaluate at this time.

Certain of the management features require further legislative attention. The rights afforded antenuptial creditors by section 2841 should be reduced. There is need to clarify the rights of unsecured creditors who extend credit after the filing of a suit which subsequently results in a judgment of dissolution. The recent proposal of the joint legislative subcommittee to amend section 2850 should be enacted to provide protection for the community interest of the spouse who accepts expressly. If a formal administration is to be available, provisions should be formulated to assure a reasonably expeditious and cost conscious proceeding. Also, criteria should be established for determining the availability of an administration when one spouse opposes its occurrence. Further, the rights of antenuptial creditors under existing administration provisions should be modified.

Despite their shortcomings, the management provisions of Act 627 for the most part are sound selections from the limited alternatives available in a single fund system affording both spouses management roles. The new provisions furnish a long needed revision and provide the framework for a workable community regime.

